In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 603

JOSEPH SANTOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1967 (Pet. App. 2). A petition for rehearing was denied on August 14, 1967 (Pet. Apps. 3 and 4). The petition for a writ of certiorari was filed on September 12, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in refusing to require the government to divulge the identity of an

278-889—67

informant, where there was no showing that the informant's testimony would be materially helpful to the defense at trial and where the government's refusal to disclose the informant's identity was essentially based upon its belief that to do so would place his life in jeopardy.

2. Whether statements volunteered by petitioner to a government agent, after being fully apprised of his right to counsel and to remain silent, were properly admitted into evidence.

3. Whether the evidence was sufficient to sustain petitioner's conviction.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of conspiring to smuggle marihuana into the United States and of aiding and abetting the substantive offense. Jointly tried and convicted with him were co-defendants Lamenca and Meza-Bustamonte. Petitioner received concurrent sentences of twenty years' imprisonment on each count (1 R. 2–4, 28). The court of appeals affirmed *per curiam* (Pet. App. 1).

1. At the trial, federal customs agent Gates testified that on May 7, 1965, an informant, who frequently reported on narcotic dealers operating in Tijuana, Mexico, advised Customs authorities that on the late afternoon of that day he had seen a 1955 Chrysler drive to the home of Patricio Becerra, a known narcotics dealer in the Tijuana area. He observed Becerra enter his garage carrying several

gunnysacks. Shortly thereafter, two unidentified men arrived in a Chevrolet Impala, California license PCB125, and drove into the garage. About five minutes later the Chevrolet was removed from the garage and the Chrysler driven in (Tr. 303–304). On that same afternoon, soon after the informant reported what he had seen, the two automobiles appeared at the port of entry at San Ysidro, California. Primarily because of the informant's tip, the automobiles and their occupants were searched. Concealed in the 1955 Chrysler, which was driven by co-defendant Bustamonte and which arrived at the border first (4 R. 48), the agents found approximately 95 pounds of marihuana. The wholesale value of this marihuana in Mexico was about $1,425 (4 R. 49–51, 70). In Bustamonte's billfold was a sales slip in Spanish with the purchaser listed as "Patricio Becerra", and written on the reverse side was the notation: "Hailanderl Motel 126 Hailand Ave. 126" (4 R. 56–57). A piece of paper in Bustamonte's pocket bore the number "6 2312" (4 R. 52–53).

In the Chevrolet, which was being driven by petitioner and arrived at the port of entry about thirty minutes after the Chrysler (4 R. 59), the agents found a license plate receipt showing the transfer of a 1963 Cadillac, New York license number 212–JS, from Joseph Santos to Patricio Becerra (4 R. 60, 64–65). Among petitioner's personal possessions the officers found a key to room 126 of the Hailanderl Motel (4 R. 71) and a business card for a car rental agency on the back of which was written "DU6–2312" (*ibid.*). ("DU" were the first two letters of a Tijuana

telephone exchange (4 R. 75).) Also found on petitioner's person was a promissory note for the purchase of the 1963 Cadillac, dated December 20, 1962 (4 R. 72).

2. After the search, petitioner was taken into custody and questioned. The customs agent told him that he did not have to talk, that anything he said could be used against him, and that he was entitled to the services of an attorney. Petitioner said that he left New York on May 6 and came alone, via United Air Lines, to the west coast; that he rented a car in Los Angeles and went to a motel; that the following day he drove alone to Tijuana; and that the number 6–3212 was that of a girl in Tijuana (4 R. 72–74). When the agent told him that they were aware that a Mr. Lamenca had checked in with him in Los Angeles, petitioner said that Lamenca, a former employee, had come with him on the flight from New York. He also said that he had been accompanied to Tijuana by Lamenca, that he stayed there, and that he did not have a key to their Hollywood motel room (4 R. 74).

The agent then told petitioner that Bustamonte had in his possession a notation of the same number that petitioner had—6–2312. Petitioner was further apprised of the fact that Bustamonte had a slip of paper that had written on it, "Highlander Motel, 126, Highland Avenue." In response petitioner said, "The damage is done now." He then stated that he had sold a 1963 Cadillac to a Mexican who had been introduced to him by Lamenca and that the real purpose of his trip was to recover the license plates which were still on the car (4 R. 74–75).

Some eleven days later, on May 18, 1965, while petitioner was at liberty in New York City, another customs agent went to petitioner's place of business to interview him about the registration of a Volkswagen which was under seizure. After the agent had obtained some information on that matter and was about to leave, petitioner followed him to the door and started telling him about the Cadillac. The agent asked him if he had a lawyer in New York, and petitioner replied that he did not, because he did not think that it was necessary. The agent told him that he should get a lawyer in New York. When petitioner continued to talk about the Cadillac the agent warned him that anything he said could be used against him. Petitioner replied that he wanted to straighten this thing out; that on March 22, 1965, he sold a 1963 Cadillac to a resident of Tijuana, Mexico, who had driven off with the New York State license tags still on the car (4 R. 10–12, 108–109).[1]

[1] The facts on the Cadillac transaction, as they were developed by the government at trial, were that on March 21, 1965 (the day before the sale of the Cadillac was supposed to have taken place in New York), a 1963 green Cadillac convertible traveling west on Highway 66 was stopped for a routine check by a New Mexico state highway patrolman. The passenger in the car, co-defendant Lamenca, said that he and the driver were on their way to California to sell it for petitioner. He had no title papers, no power of attorney to sell, and no "caravan license," as required by New Mexico law. The patrolman placed a collect call to petitioner in New York, who denied knowing anything about a 1963 Cadillac (Tr. 141–146). Lamenca then told the patrolman that petitioner was going to come to California with a girl friend, which was the reason for the story about the resale. On a second call, petitioner told the patrolman that there was no girl friend and that the reason the car was being transported to California was to sell it (5 R. 146–147).

3. The government refused to disclose the name of the informant who had provided the information about the automobiles because, as it advised the trial court outside of the presence of the jury, to do so would have placed his life in jeopardy. After a preliminary ruling that divulgence was not required (3 R. 298–303), the court stated that if defense counsel wished to, he could place petitioner on the stand "so that we can determine whether or not the informant might assist in the defense" (Tr. 305). Counsel then called petitioner to the stand. In the absence of the jury, he testified that he went to a house at the outskirts of Tijuana to see Becerra about the registration of the car, but that he saw no 1955 Chrysler and no garage. In response to the court's questioning, petitioner testified further that he had sold a Cadillac in New York City to a nephew of Becerra; that he had given Becerra half of the bill of sale; and that co-defendant Lamenca was to take the car to Los Angeles and bring back the license plates. If Becerra could not register the car in his name, Lamenca was to bring the car back to New York and petitioner promised to refund the purchase price (3 R. 318–319).

The court characterized this account as an "unbelievable story" and stated that it was not going to cause a dismissal of the case because of the government's refusal to disclose the name of the informant (3 R. 319–329).

ARGUMENT

1. As this Court has stressed, there is no fixed rule to determine when the identity of an informant must be divulged for the purpose of assisting the defense.

"The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Roviaro* v. *United States,* 353 U.S. 53, 62; *Rugendorf* v. *United States,* 376 U.S. 528, 534–535; *McCray* v. *Illinois,* 386 U.S. 300, 310–311. These principles were correctly applied in the instant case.

The particular circumstances showed that the informant took no part in any transactions at the garage but merely reported to the Customs authorities what he had witnessed at that location. Nor did his information link petitioner to what he had seen—in fact, he identified none of the individuals involved at the garage, except for Becerra, the known narcotics trafficker. Moreover, although petitioner was afforded a full opportunity to do so by the trial judge, he did not establish how the informant's testimony could have been truly relevant or helpful at trial. Indeed, whatever the informant might have testified to concerning what he had seen, the basic evidence establishing petitioner's guilt—*i.e.,* the items seized on the search of the two automobiles and petitioner's several false versions of his conduct given to the agents—would remain unshaken. On the other hand, the government's refusal to divulge was based on the significant concern that revealing its source might hinder the government's general investigation into the narcotics traf-

fic from Tijuana and might well place the informant's life in jeopardy. In short, the trial judge was wholly justified in striking the "proper balance" in this case by ruling against disclosure.[2]

2. There is no substance to petitioner's contention that the statements he volunteered to a government agent during the May 18, 1965, interview in New York were inadmissible under *Massiah* v. *United States,* 377 U.S. 201. Despite petitioner's assertion to the contrary (Pet. 10), the interview occurred over two months before the return of the indictment on July 21, 1965, and therefore the Sixth Amendment rule of *Massiah* has no application in this case.[3] Moreover, unlike the situation in *Massiah,* petitioner was not the victim of a surreptitious surveillance arranged by government agents for the purpose of securing incriminating admissions for use against him at trial. On the contrary, petitioner made his May 18 statements on his own

[2] Although the court of appeals fully agreed that petitioner's rights were not violated by the handling of the disclosure issue, the court did note that "conceivably" the informant's testimony might have aided the case of co-defendant Bustamonte because of his trial claim that he had been duped into driving the Chrysler across the border and had not participated in secreting the marihuana in the car (Pet. App. p. 2a). However, there was nothing in the information conveyed by the informant that tended to identify Bustamonte with what was seen at the Becerra garage. His involvement in the scheme was established by his driving the vehicle, transporting the marihuana, and possessing incriminating documents.

[3] As this Court stated it, *Massiah* held that a defendant is denied his Sixth Amendment guarantees "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him *after he had been indicted* and in the absence of his counsel" (377 U.S. at 206; emphasis added).

initiative, at his own office, with full knowledge that he was talking to a government agent, and after being advised to secure counsel and warned of his right to remain silent.[4]

3. Petitioner's final point is similarly without substance. There is no occasion for this Court to review the sufficiency of the evidence. As the record shows (see Statement, *supra* pp. 2–6), and as the court of appeals found (Pet. App. 1), the evidence of petitioner's obvious connection with the scheme to smuggle marihuana into this country, "combined with [petitioner's] false statements to government agents, made a sufficient case for the jury." See *Glasser* v. *United States*, 315 U.S. 60.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH S. SPRITZER,
Acting Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
JEROME M. FEIT,
KIRBY W. PATTERSON,
Attorneys.

OCTOBER 1967.

[4] Petitioner's reliance upon the American Bar Association admonition that an attorney should not talk to an opposing party litigant outside of the presence of his counsel (Canon 9) is equally misplaced. Apart from the fact that this rule is not of constitutional dimension, it would, in any event, be inapposite here "because it deals with the conduct of lawyers and not with the conduct of investigators" *Massiah* v. *United States*, *supra*, 377 U.S. at 210–211 (dissenting opinion).

U.S. GOVERNMENT PRINTING OFFICE: 1967